Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ADMIRAL INSURANCE COMPANY,

Petitioner,

v.

CAST STEEL PRODUCTS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit's interpretation of the traditional claims-made insurance policy, which is in direct conflict with every United States Court of Appeals on this same important matter, is a question of exceptional importance because it transforms the traditional claims-made insurance policy into an occurrence policy by extending the notice provisions and therefore extending coverage where none previously existed?

PARTIES TO THE PROCEEDING

Admiral Insurance Company

Cast Steel Products, Inc.

CORPORATION DISCLOSURE STATEMENT

Parent corporations and publicly held companies owning 10% or more of Admiral Insurance Company's corporate stock:

J/I Holding Corporation

W.R. Berkley Corporation

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The Eleventh Circuit's interpretation of the traditional claims-made insurance policy is in direct conflict with every United States Court of Appeals on this same important matter and is a question of exceptional importance in that it, in essence, transforms the traditional claims-made insurance policy into an occurrence policy by re-writing the claims-made policy to extend the notice provisions and therefore extend coverage, where none previously existed. This is a result neither bargained for nor contracted for by the insurer and insured, thereby negating a longstanding fundamental concept of insurance law 6

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(1) *Cast Steel Products, Inc. v. Admiral Ins. Co.*, ___F.3d _____, 2003 WL 23190917 (11th Cir. (Fla.) Dec. 29, 2003) (TABLE, NO. 02-16511);

(2) *Cast Steel Products, Inc. v. Admiral Ins. Co.*, 348 F.3d 1298 (11th Cir. 2003), 16 Fla. L. Weekly Fed. C 1243; and

(3) *Cast Steel Products, Inc. v. Admiral Ins. Co.*, Case No.: 6:01-cv-1058-Orl.-28JGG, Order filed October 31, 2002.

Statement of Basis for Jurisdiction in the Court

On October 28, 2003, the United States Court of Appeals for the Eleventh Circuit entered its opinion reversing the district court's decision and remanding this matter to the district court with instructions to enter judgment in Cast Steel's favor. *Cast Steel Products, Inc. v. Admiral Ins. Co.*, 348 F.3d 1298 (11th Cir. 2003).

On December 29, 2003, the United States Court of Appeals for the Eleventh Circuit denied Admiral's Petition for Rehearing and Rehearing En Banc. *Cast Steel Products, Inc. v. Admiral Ins. Co.*, _____ F.3d _____, 2003, WL 23190917 (11th Cir. (Fla.) December 29, 2003)(TABLE, NO. 02-16511).

This Court has jurisdiction to hear this case from the United States Court of Appeals for the Eleventh Circuit based upon Admiral Insurance Company's Petition for Writ of Certiorari pursuant to *28 U.S.C. § 1254.*

Constitutional Provisions

There are no constitutional provisions, treaties, statutes, ordinances, or regulations involved in this case.

STATEMENT OF THE CASE

a. Procedural History

This proceeding began as a lawsuit initiated by the Respondent, Cast Steel Products, Inc. ("Cast Steel") against Petitioner, Admiral Insurance Company ("Admiral") seeking a determination of coverage under certain professional liability insurance policies purchased by Cast Steel from Admiral, including a 1999 professional liability insurance policy (the "1999 PL Policy"), a 2000 professional liability insurance policy (the "2000 PL Policy") collectively (the "Professional Liability Policies") and a 1999 comprehensive general liability policy (the "1999 CGL Policy"). After the completion of discovery, both parties filed Motions for Summary Judgment. Cast Steel's motion was granted and denied in part. Partial summary judgment was granted in favor of Cast Steel as to: (1) certain affirmative defenses asserted by Admiral; and (2) a declaration that an exclusion in the 1999 CGL Policy related only to the 1999 CGL Policy and not to the Professional Liability Policies. In all other respects, Cast Steel's Motion for Summary Judgment was denied.

On the other hand, Admiral's Motion for Summary Judgment was granted in its entirety. The District Court ruled that there was no coverage available to Cast Steel under the Professional Liability Policies, or the CGL Policy. Final Judgment was therefore entered in favor of Admiral and against Cast Steel.

Cast Steel appealed the Final Judgment of the District Court in favor of Admiral. In particular, Cast Steel argued that the District Court erred in granting Admiral's Motion for Summary Judgment. Notably, however, Cast Steel *did not appeal* from the District Court's denial of its Motion for Summary Judgment.

On October 28, 2003, the United States Court of Appeals for the Eleventh Circuit entered an Order reversing the District Court's decision and remanding this matter to the District Court with instructions to enter judgment in Cast Steel's favor on the 1999 PL Policy.

On December 29, 2003, the United States Court of Appeals of the Eleventh Circuit denied Admiral's Petition for Rehearing and Rehearing *En Banc.*

b. Facts of Case

For purposes of this Petition, in 1999, Cast Steel purchased the 1999 PL Policy from Admiral. The 1999 PL Policy had a policy period from January 6, 1999 through January 6, 2000 at 12:01 a.m., with a retroactive date of January 6, 1999. On its face, the 1999 PL Policy provided that Admiral would pay covered claims that are *first made against the insured (Cast Steel) and reported to the company (Admiral) during the policy period. The 1999 PL Policy was a classic "claims-made" policy.* (Emphasis added). The 1999 PL Policy also expressly provided that in the event the *policy was cancelled or not renewed by the named insured, an automatic thirty (30) day claims extension period would apply to claims. (Emphasis added).*

In mid to late August 1999, Cast Steel learned of a possible claim that might be asserted against it by Hibbing Taconite Company ("Hibbing"), one of its customers. Ultimately, it was determined that it was Cast Steel's negligence which caused Hibbing's damages.

In September 1999, Douglas Poland of Cast Steel advised Robert Harding of Ayers/Sierra Insurance Associates ("Ayers/Sierra"), its local insurance agent, of Hibbing's possible claim. (Doc. 41 at 32). In late November, Mr. Poland instructed Mr. Harding to make a claim with Admiral. (Doc.

41 at 35). Around Thanksgiving 1999, Mr. Harding wrote a note to Jodi Fagan, a claims specialist at Ayers/Sierra, to file a claim for Cast Steel based on the Hibbing problem. (Dep. of Robert Harding, Doc. 37 at 54-56). *According to Mr. Harding, the claim should have been reported on the same day he wrote the note to Ms. Fagan.* (Dep. of Robert Harding, Doc. 37 at 58). However, *Ayers/Sierra failed to submit the claim until the afternoon of January 6, 2000, after* the 1999 PL Policy had expired at 12:01 a.m. on that date. Ms. Fagan faxed the claim to Gary Markel Surplus Lines ("Markel"), a Florida registered surplus lines agent. (Dep. of Jodi Fagan, Doc. 39 at 27). By statute, only Florida resident surplus lines agents can obtain surplus lines insurance policies, such as the Professional Liability Policies and the 1999 CGL Policy. *§626.915, Fla. Stat. (2002)* Admiral then received the claim notice from Markel *on January 10, 2000.* (Dep. of Edward Howley, Doc. 34 at 33).

On June 29, 2000, after an investigation was conducted by Admiral through an independent claims insurance adjuster, Admiral took the position that there was no coverage available to Cast Steel under the 1999 PL Policy as the claim was undeniably not reported to Admiral during the policy period, which expired at 12:01 a.m. on January 6, 2000. (Exhibit 10 to Doc. 34, at 6). Additionally, Admiral denied coverage to Cast Steel under the 2000 PL Policy as: (1) the claim was not first made against Cast Steel during the policy period; and (2) Cast Steel had knowledge of Hibbing's claim prior to the inception of the policy period. (Exhibit 10 to Doc. 34 at 6). Unable to resolve its dispute with Admiral, Cast Steel filed suit in Florida State Circuit Court. Admiral removed the lawsuit to the United States District Court for the Middle District of Florida based upon diversity of citizenship and jurisdictional amount in controversy. *28 U.S.C. §1332.*

Argument

The Eleventh Circuit's Interpretation of the Traditional Claims-Made Policy is in Direct Conflict with Every United States Court of Appeals on this Same Important Matter and is a Question of Exceptional Important in that it, in Essence, Transforms the Traditional Claims-Made Policy into an Occurrence Policy By Re-Writing the Claims-Made Policy to Extend the Notice Provisions and Therefore Extend Coverage Where None Previously Existed. This is a Result Neither Bargained for nor Contracted for by the Insurer and Insured, Thereby Negating a Longstanding Fundamental Concept of Insurance Law.

In a classic claims-made insurance policy, it is well understood that the claim must be *made against the insured and reported to the insurer* during the policy period. This reporting requirement is, of course, an essential requisite to triggering coverage. Numerous courts, including the Supreme Court of Florida, recognize the reporting requirement as a key feature of claims-made policies. *See Gulf Ins. Co. v. Dolan, Furtig & Curtis*, 433 So.2d 512, 515 (Fla. 1983)*(extending the reporting time in a claims-made policy negates one of its distinguishing characteristics*). (Emphasis added.)

Claims-made insurance originated in response to the greatly increased exposure of insurers to the "long tail" coverage provided under "occurrence" policies. As occurrence policies provide coverage on the basis of when an event or damage occurs, regardless of when the claim is brought against the policy holder, insurers faced exposure extending well beyond the term of the policy. See *National Union Fire Ins. Co. v. Bauman*, 1992 WL 1738, *5 (N.D.Ill., Jan. 2, 1992), *aff'd* 997 F.2d 305 (7th Cir. 1993), citing *Zuckerman v. National Union Fire Ins. Co.*, 495 A.2d 395, 398 (N.J.1985). "This long tail exposure inherent in occurrence policies, which may

well extend beyond the policy period, creates serious actuarial difficulties for insurers. Because insurers are prevented 'from making a precise calculation of premiums based upon the cost of the risks assumed . . . "occurrence" policy premiums have proven to be grossly inadequate to cover the inflationary increase in the cost of settling claims asserted years later.'" *Id.* quoting *Zuckerman,* 495 A.2d at 398.

In contrast, claims-made policies, including the 1999 CGL and the PL Policies, eliminate long tail exposure by terminating the liability of the insurer at a fixed point in time. "By fixing a certain date at which the insurer's liability exposure ends, the reporting provision of a claims-made policy allows the insurer to 'establish his reserves without having to consider the possibilities of inflation beyond the policy period, upward-spiraling jury awards, or later changes in the definition and application of negligence.'" *Id.* quoting *City of Harrisburg v. Int'l Surplus Lines Ins. Co.,* 596 F.Supp. 954, 961 (M.D. Pa. 1984), *aff'd* 770 F.2d 1067 (3d Cir. 1985). By precisely limiting the insurer's risk, the claims-made policy holder generally receives such coverage at a lower premium and benefits from coverage for acts occurring prior to the policy period. See *id.*

> The *reporting requirement in a claims-made policy thus helps define the scope of coverage by providing a certain date after which an insurer knows it is no longer liable under the policy.* In contrast, the notice provision in an occurrence policy does not aid in defining the coverage provided by the policy. Rather, it gives the insurer time to investigate the claim for defense or settlement. (Emphasis added).

Id. at *6. Thus, claims-made policies were conceived and written to meet the needs of insurers for underwriting

certainty and were expressly intended to avoid lengthy delays between the expiration of the policy and the materialization of claims.

In *Gulf Ins.*, the Florida Supreme Court addressed the reporting requirement under a claims-made policy. The policyholder in that case was a law firm insured under a professional liability policy issued on a claims-made basis. In *Gulf Ins.* the court framed the issue as follows: "whether the Court can engraft upon an unambiguous claims-made insurance policy a reasonable additional period of time after the policy period expires for reporting claims that arise late in the contract term." *Id.* at 513. The *court answered in the negative,* holding that *failure to notify the insurer within the time prescribed by the policy results in no coverage for the claim.* (Emphasis added). *Id.* at 514.

The insured in *Gulf Ins.* was informed of a claim against it on the last day of the effective period of the policy. *Id.* at 513. The insurer had to be notified *during the policy period. Id.* at 516. The law firm failed to report the claim to the insurer within the policy period and the insurer denied coverage. *Id.* at 514. Coverage litigation ensured, and the trial court found that there should be a reasonable time for reporting claims discovered late in the policy period after the termination of the policy. *Id.*

On appeal, the Florida Supreme Court examined the reporting requirement under claims- made policies and contrasted the requirement with the notice condition in occurrence policies. The court noted that coverage under occurrence policies "depends on when the negligent act or omission occurred and not when the claim was asserted." *Id.* at 515. The court explained that notice is only a condition of an occurrence policy, and is not a grant of coverage under the policy. *Id.* The *court then explained the reporting requirement*

under claims-made policies as follows:

> *Coverage depends on the claim being made and reported to the insurer during the policy period. Claims-made* or discovery policies are essentially *reporting policies.* If the claim is reported to the insurer during the policy period, then the carrier is legally obligated to pay; if the *claim is not reported during the policy period, no liability attaches.*

Id. at 515-16 (Emphasis added). The court rejected the lower court's grant of additional time to report the claim under the claims-made policy at issue, by holding as follows:

> If a *court were to allow an extension of reporting time after the end of the policy period, such is tantamount to an extension of coverage to the insured gratis,* something for which the *insurer has not bargained.* This *extension of coverage,* by the court, so very different from a mere condition of the policy, *in effect rewrites the contract between the two parties. This we cannot and will not do.* (Emphasis added).

Id. The same analysis and result followed in *United National Ins. Co. v. Jacobs,* 754 F.Supp. 865, 869 (M.D. Fla. 1990)(*no coverage under claims-made policy for policyholder that reported claim several hours after end of reporting period*). (Emphasis added).

It is respectfully noted that the *Gulf Ins.* decision and its progeny are in line with the vast majority of the decisions

interpreting claims-made policies.[1] In fact, each Circuit that has addressed this issue has consistently held in favor of the enforceability and integrity of the claims-made policy.

In *United States v. A.C. Strip*, 868 F.2d 181 (6th Cir. 1989), two (2) claims-made lawyers professional liability insurance policies were issued to a law firm and its lawyers. The coverage language was virtually identical to the 1999 PL Policy in this case. The first policy covered the period from August 2, 1984 to August 2, 1985. The second policy covered the period from August 2, 1985 to August 2, 1986. The claim against one of its lawyers was made on July 25, 1985, well within the first policy period, however, not reported to the insurer until August 19, 1985, more than two weeks after the expiration of the first policy period. *In finding that there was no coverage for the claim under the first policy, the Sixth Circuit opined, as follows:*

> The *Pacific policy coverage language is written in plain, unambiguous language and clearly states that a claim just be made and reported within the policy period.* It is *exactly this aspect of a claims-made policy that distinguishes it from an occurrence policy. Claims-made policies,* unlike occurrence policies, are *designed to limit liability to a fixed period of time.* To *allow coverage beyond that period would be to grant the insured more*

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See Accord Paint Shuttle, Inc. v. Continental Casualty Co., 733 N.E. 2d 513, 522 (Ind. Ct. App. 2000), *City of Harrisburg v. International Surplus, Ins. Co., supra.; National Union Fire Ins. Co. of Pittsburgh v. Baker & McKenzie*, 997 F.2d 305, 306 (7th Cir. 1993); *Asp v. Ohio Medical Transportation, Inc.*, 2001 WL 721854 (Ohio App. 10 Dist)(June 28, 2001); *CheckRite Ltd., Inc. v. Illinois National Ins. Co.*, 95 F.Supp. 2d 180 (S.D.N.Y. 2000).

> *coverage than he bargained for and paid for, and to require the insurer to provide coverage for risks not assumed.* (Emphasis added).

Id. at 187. There was *no coverage under the second policy as well because the claim was not "made against the insured during the policy period."* (Emphasis added). *Id.* at 189. Accordingly, there was no coverage under either policy.

In *National Union Fire Insurance Company of Pittsburgh v. Baker & McKenzie*, 997 F.2d 305 (7th Cir. 1993), the *Seventh Circuit upheld a judgment in favor of the insurer under a claims-made policy where the claim was made during the first policy year but not reported until the second policy.* (Emphasis added). In upholding the integrity of the traditional claims-made insurance policy, the court noted the following:

> Conventional liability insurance policies are "occurrence" policies; they insure against a negligent or other liability-causing act or omission that occurs during the policy period regardless of when a legal claim arising out of the act or omission is made against the insured because of the indefinite future liability to which an occurrence policy exposes the insurance company, these companies now offer (also or instead) *"claims-made" policies, which limit coverage to claims-made during the policy period.* The *coverage is less but so, therefore, is the cost.*

(Emphasis added). *Id.* at 306. It was *undisputed that the claim was made during the first policy period* (July 15, 1987 - July 15, 1988), but *not reported until that policy had expired and a renewal policy was issued for a second year.* Significantly, the *fact that it was a renewal on substantially identical terms was of no import.*

In *National Union Fire Insurance Co. v. Talcott*, 931 F.2d 166 (1st Cir. 1991), *the First Circuit affirmed summary judgment in favor of the insurer under a claims-made professional liability policy where a claim was made against an insured, an attorney, on January 26, 1985 during one policy period* (April 28, 1984 - April 28, 1985), *but not reported to the insurer until the next policy period* (April 28, 1985 - April 28, 1986), even though the insured had been and continued to be continuously insured by identical National Union policies from April of 1977 through April of 1986. (Emphasis added). The First Circuit explained as follows:

> The *purpose of the Notice requirement in "claims-made" policies is to ensure "fairness in rate setting,"* (citation omitted) whereas its purpose in an "occurrence" policy is "to permit an insurer to make an investigation of the facts ... relating to liability," (citation omitted). A *late notice would clearly always inhibit the insurer's task of setting its future premiums and reserves with full knowledge of the outstanding claims it is obligated to meet,* while it would not necessarily have the same effect with regard to the investigation of the facts pertaining to the insured event.

(Emphasis added). *Id.* at 167, n.4. Accordingly, the First Circuit required strict compliance with the claims-made notice requirement and found that the insurer was legally justified in denying coverage.

Similarly, in *Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co.*, 174 F.3d 653 (5th Cir. 1999), the *Fifth Circuit affirmed summary judgment in favor of an insurer based upon untimely notice under a claims-made policy.* The court stated the following:

> ... the impact that untimely notice has on coverage depends on the type of insurance policy. For example, courts traditionally distinguish between two types of insurance policies: "occurrence" policies and "claims-made" policies. In the case of an "occurrence" policy, any notice requirement is subsidiary to the event that triggers coverage. (Citations omitted) Courts have not permitted insurance companies to deny coverage on the basis of untimely notice under an "occurrence" policy unless the company shows actual prejudice form the delay. (Citations omitted). In the *case of a "claims-made" policy,* however, *notice itself constitutes the event that triggers coverage.* (Citations omitted). Courts *strictly interpret notice provisions in a "claims-made" policy.* ... the fact that courts strictly enforce notice requirements in "claims-made" policies, but take a distinct approach towards notice requirements in "occurrence" policies, reflects a difference in the nature of the bargain underlying each type of policy. *Courts interpret notice provisions in "claims-made" policies strictly because in these types of policies, unlike in "occurrence" policies, the insured and insurer specifically negotiate the terms of the notice provisions.* ... Hence, *courts will not "rewrite policies to permit notice-prejudice to be applied to claim-made policies* ... [because to do so] would ... *interfer[e] with the public's right to contract."* (Citation omitted.)

(Emphasis added). *Id.* at 658-659.

Finally, and more importantly, even the Eleventh

Circuit in its affirmance of *Pantropic Power Products, Inc. v. Fireman's Fund Ins. Co.*, 141 F.Supp. 2d 1366 (S.D.Fla. 2001) *aff'd* 34 Fed. Appx. 968 (11th Cir. 2002), recognized and reaffirmed the sanctity and enforceability of a claims-made policy.

In *Pantropic*, the Eleventh Circuit was faced with strikingly similar facts as were presented to the Eleventh Circuit in *Cast Steel*. The operative insurance policy in *Pantropic* was a "claims-made" policy which limited coverage to claims first made against the insured and reported to the insurer during the policy period. The only difference between the 1999 PL Policy and the *Pantropic* policy was that in *Pantropic* there was a 60 day grace period following the end of the policy period in which to report the claim. *See Pantropic* at 1368. *Here, the 1999 PL Policy expressly states that there is an automatic thirty (30) days to report the claim if either one or two events occurs:* the *policy is cancelled or not renewed. Otherwise, there is no extended reporting period.* It was undisputed that the claim in *Pantropic* was made during the policy period, but not reported until after the expiration of the 60 day grace period. (Emphasis added). *Pantropic* at 1369. Also, in *Pantropic*, the court was faced with the argument that the renewal of the first claims-made policy by the second claims-made policy extended the time to report the claim and thus expanded the scope of coverage. *Pantropic* at 1370. The issues of the clarity of the extended reporting period and attempted expansion of the claims-made coverage in *Pantropic* are identical to the issues that the Eleventh Circuit considered in *Cast Steel*. In both *Pantropic* and *Cast Steel*, the court did not find an ambiguity in the claims-made clause. However, the court in *Cast Steel* contrary to *Pantropic*, determined there was an ambiguity in the extended reporting period provision, i.e. whether there was an additional 30 days to report the claim in the event the policy was renewed. Contrarily, in *Pantropic*, the court decided that the renewal of the policy by the second

policy did not extend the time to report the claim under the first claims-made policy. "The contract clearly contemplated that each policy run for a separate and finite period, running from the date of inception to the date of expiration." *Id.* In *Pantropic,* the declaration page identified the inception date of July 1, 1998 and an expiration date of one year later on July 1, 1999. In *Cast Steel,* the declaration page identified the policy period as running form January 6, 1999 to January 6, 2000. Further, coverage limits are defined with respect to each policy period. The policy limits apply separately to each consecutive annual policy period.

In *Cast Steel,* the same is true. There was continuous coverage under the PL Policies between January 6, 1999 through January 6, 2001, the expiration of the 2000 PL Policy. However, based on the express language under the PL Policies, Cast Steel was required to timely notify Admiral of the claim during the policy period in which it was asserted against Cast Steel. The expanded reporting period under the 1999 PL Policy clearly and unambiguously provided that the expanded reporting period became effective only if the policy was *cancelled and not renewed.* Here, in *Cast Steel,* the claim was asserted by Hibbing against Cast Steel in 1999 and in order to trigger coverage had to be reported to Admiral before the expiration of the 1999 PL Policy, which it was not.

Additionally, in *Pantropic,* the insured argued that there was an ambiguity created in the policy by including "nonrenewal" as one of the circumstances requiring that the insured purchase of an extended reporting period to maintain coverage, where the contract was silent on the effect of renewal on the insured's maintenance of coverage. *Pantropic* at 1370. In *Pantropic,* the insured relied on *Helberg v. National Union Fire Ins. Company,* 102 Ohio App. 3d 679, 567 N.E. 2d 832 (1995), in which the court found conflicting policy language, created an ambiguity which resulted in coverage in

favor of the insured. However, contrary to the *Pantropic* policy and the 1999 PL Policy herein, the *Helberg* policy contained language under the exclusion section contemplating a single policy period, which the insured could continuously renew. The effect of that provision was to exclude coverage of any claim which the insured knew about before the effective date of the first policy issued. The *Helberg* court could not reconcile this section with the notice provision of the contract which limited coverage to claims made and reported during the policy period.

By contrast in *Pantropic*, this court found that no such conflict existed in the policy under consideration and therefore, the *Helberg* holding was inapplicable to that dispute. Here, in *Cast Steel*, as in *Pantropic*, there is no conflict in the extended reporting provision and any other provisions in the 1999 PL Policy. Therefore, the *Helberg* decision should not have been utilized by the court to find an ambiguity in the extended reporting period provision. Indeed, the 1999 PL Policy, on its face, states that it is a claims-made policy which limits coverage to claims first made against the insured during the policy period *and* reported to Admiral during the policy period. Based on the plain meaning, the extended reporting provision *only applies* if the policy is cancelled or not renewed. It is submitted that it is clear that there is no extended reported period if the policy is renewed as it was herein. As the *Pantropic* court opined, "Plaintiff's attempt to create ambiguity where none exists is unavailing." *Id.* at 1371. Admiral submits that the same reasoning applies herein.

Despite the Eleventh Circuit's affirmance of the *Pantropic* decision "based upon the thorough opinion of the District Court," the Eleventh Circuit in *Cast Steel* found that there was somehow an ambiguity in the extended reporting period provision in the 1999 PL Policy. The court therefore construed the ambiguity in favor of Cast Steel, resulting in

coverage for Hibbing's claim.

Here, Cast Steel did not merely breach a condition of the 1999 PL Policy when it failed to timely report the claim. Rather, Cast Steel's failure to give Admiral timely notice, as a matter of law, took the matter outside of the 1999 PL Policy's insuring agreement. Under controlling law, the reporting requirement is strictly construed because reporting is essential to a claims-made policy. The failure to report a claim during the reporting period - even by a day - fails to satisfy the prerequisites for coverage under the insuring agreement. *Id.* Admiral submits that by finding coverage for Cast Steel under the 1999 PL Policy, the Court rewrote the terms and conditions under the 1999 PL Policy - a result that is plainly not permitted under Florida law, (see e.g. *Gulf Ins.* 433 So.2d at 515-16), or by any Circuit which has addressed this issue. In fact, carrying the ruling in *Cast Steel* to an extreme, an insured could continually renew its claims-made policy for ten (10) years and report a claim, regardless when it was made, at anytime during that ten (10) year period. Suffice it to say, this is clearly not what the parties bargained for when Cast Steel purchased the 1999 PL Policy from Admiral, but what, in fact, Cast Steel ended up receiving as a result of the decision in *Cast Steel.*

CONCLUSION

Based on the foregoing, this petition involves a question of exceptional importance in fundamental insurance law and one that this Court should grant certiorari review.

Respectfully submitted,

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APPENDIX

[PUBLISH]

FILED
US COURT OF APPEALS
ELEVENTH CIRCUIT
October 28, 2003
THOMAS K. KAHN

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-16511

D.C. Docket No. 01-01058-CV-ORL-28

CAST STEEL PRODUCTS, INC.

Plaintiff-Appellant,

versus

ADMIRAL INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(October 28, 2003)

Before BLACK and FAY, Circuit Judges, and JORDAN*, District Judge.

FAY, Circuit Judge:

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*Honorable Adalberto J. Jordan, United States District Court Judge for the Southern District of Florida, sitting by designation.

Cast Steel Products, Inc. ("Cast Steel") appeals an adverse summary judgment granted to Admiral Insurance Company ("Admiral") on Cast Steel's action for a declaration that either (or both) of its 1999 and 2000 "claims-made" professional liability policies with Admiral covered a defective product claim that accrued at the conclusion of the 1999 policy period but was not reported until the start of the 2000 policy period. The district court found that neither policy provided coverage for the claim because the claim had not both accrued and been reported to Admiral during the same policy period. Cast Steel argues on appeal that the 1999 Professional Liability Policy ("99 Policy") is ambiguous with respect to coverage of the 1999 claim upon renewal of the 99 Policy in 2000. Specifically, Cast Steel contends that because the 99 Policy automatically extends the claims reporting period upon *cancellation* or *non-renewal* of the policy, but is silent as to whether *renewal* of the policy would provide the same reporting extension, an unresolved ambiguity exists in the policy that precluded the district court from granting summary judgment.

We agree that the 99 Policy is ambiguous. We further find that, because under Florida law an ambiguity in an insurance policy must be construed in favor of the insured so as not to deny coverage, summary judgment should have been granted to Cast Steel. *Swire Pacific Holdings, Inc. v. Zurich Ins., Co.*, 845 So. 2d 161, 165 (Fla. 2003). Accordingly, we REVERSE the district court's order granting summary judgment in Admiral's favor, and REMAND to the district court with instruction to enter summary judgment in Cast Steel's favor as to the 99 Policy.

I.

Cast Steel is a Florida corporation in the business

of supplying castings and components to the mining and waste energy industries. In early 1999, it purchased professional liability insurance from Admiral, a surplus lines insurer headquartered in Delaware, through Admiral's designated surplus lines broker in the state of Florida, Gary Markel. [1] The 99 Policy had a retroactive effective date of January 6, 1999 and an expiration date of January 6, 2000, at 12:01am. Cast Steel subsequently renewed the 99 Policy, and the renewal policy had an effective date of January 6, 2000, and expiration date of January 6, 2001 ("00 Policy")[2] Both policies, by their terms, were "claims-made" policies, which meant that each policy purported to cover only those claims which had both accrued *and* were reported to Admiral during the policy period indicated on the face of the policy.

Sometime in early 1999, Cast Steel was awarded a contact to provide 130 pallet cars to Hibbing Taconite ("Hibbing"), an iron ore mine located in Hibbing, Minnesota, for the purchase price of $5.5 million. Cast Steel delivered the cars in June 1999. Soon thereafter, in August 1999, Hibbing reported significant problems with the wheels of the cars, which, after some investigation,

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[1] Cast Steel actually purchased the 99 Policy through Ayers/Sierra, a local insurance broker. Because Ayers/Sierra was not in the business of selling surplus lines insurance, it sought out Markel, a surplus lines agent for Admiral's products in Florida.

[2] Cast Steel also purchased a commercial general liability policy from Admiral in early 1999 (the"CGL Policy"), and it sought declaratory relief under that policy as well. The district court ultimately determined that the CGL Policy, by its plain language, did not cover the claim at issue. Cast Steel does not challenge that finding on appeal. Thus, in order to avoid confusion, we focus only on the professional liability policies (which we refer to as the "99 Policy" and "00 Policy") in this opinion.

Cast Steel determined to be caused by defective design of the bearings. On October 21, 1999, Hibbing prepared an incident report and formally reported its claim to Cast Steel. Cast Steel immediately advised Ayers/Sierra of the Hibbing claim and asked that the proper claim paperwork be prepared. In an unfortunate twist of fate, Ayers/Sierra failed to submit the Hibbing claim to Admiral until January 6, 2000 - just hours after the 99 Policy had expired.

On February 10, 2000, Admiral sent Cast Steel a reservation of rights letter and began ivestigating the Hibbing claim.[3] After four months of investigation by an independent claims adjuster, Admiral sent Cast Steel a letter denying coverage under all policies.

This suit following on July 25, 2001. Cast Steel originally brought the action in Florida state court, seeking, *inter alia*, a declaration that at least one of the various policies obligated Admiral to cover the Hibbing claim. Admiral removed the action to the Middle District of Florida on diversity grounds and, in July 2002, Cast Steel moved for summary judgment on the 99 Policy. Admiral's own summary judgment motion followed. On October 24, 2002, the district court entertained oral argument and in November granted summary judgment to Admiral, finding that none of the policies provided coverage to Cast Steel.

Specifically, the district court determined that Cast Steel failed to comply with the 99 Policy's notice

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[3] Admiral sent the reservation of rights letter only as to the CGL Policy, and Cast Steel argues that, as a result, Admiral never reserved its right to deny coverage under the 99 or 00 Policies. We find this argument unavailing, however, because Cast Steel only made a claim under the CGL Policy, and Admiral took it upon itself to determine whether any of Cast Steel's three policies provided coverage.

requirement when it failed to report the Hibbing claim during the 99 Policy period. As to the 00 Policy, the court held that because the Hibbing claim accrued during 1999, and Cast Steel was undisputedly aware of the claim when it renewed the policy, the plain language of the 00 Policy precluded coverage.[4] With respect to Cast Steel's argument that Admiral was on notice of its claim because Admiral (or Admiral's surplus lines broker Markel) cloaked Ayers/Sierra with apparent authority to receive claims on Admiral's behalf, the district court found that Cast Steel failed to show that Admiral ever represented to Cast Steel that Aters/Sierra was its agent in this regard and, moreover, the record showed that Ayers/Sierra itself adamantly denied being Admiral's agent or ever making a representation to Cast Steel that it was Admiral's agent.

Cast Steel asserts on appeal that the district court erred in granting summary judgment to Admiral because issues of fact remained as to whether Ayers/Sierra was cloaked with apparent authority to receive claims on behalf of Admiral. Cast Steel also argues that an unresolved ambiguity as to whether renewal of the 99 Policy extended the period in which it could report claims precluded summary judgment on Admiral's behalf.

II.

We review a district court's granting of a motion for summary judgment *de nova*, applying the same legal standards used by the district court. *Hilburn v. Murata*

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[4] Section II(B)(2)(a) of the 00 Policy indicates claims arising prior to the effective date of the policy are covered only if the insured had no knowledge of the claim as of the date of signing the application for the policy.

Elecs. N. A., Inc., 181 F.3d 1220, 1225 (11th Cir. 1999). We "view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion." *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 (11th Cir. 1999) (quoting *Clemons v. Dougherty County*, 684 F.2d 1365, 1368 (11th Cir. 1982)). Denial of summaryjudgment is also reviewed *de nova*. *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1311 (11th Cir. 2002).

III.

The district court's decision presents a somewhat alarming scenario. Faced with two consecutive insurance policies that created apparently seamless coverage over two policy periods, the court nevertheless found that a claim accruing within the two periods was somehow not covered by either policy. On the face of the 99 and 00 Policies, there appears to be no gap in coverage. Indeed, the 99 Policy was effective until 12:01a.m. on January 6, 2000, and the 00 Policy was retroactively effective beginning on January 6, 2000 (presumably at 12:01 a.m.). At a glance, one would be hard pressed to imagine how a claim accruing in the middle of the two policy periods would not be covered by one of the policies. But because a claims-made policy is designed to cover only claims both accruing and reported during the specified policy period, the district court held that a claim which accrued late in the first policy period but was not reported until early in the second was covered by nether policy.

Cast Steel challenges the district court's conclusion, and argues that because the 99 Policy automatically extends (by thirty days) the period in which to report 1999 claims if the insured elects to cancel or non-renew the policy, there remains an ambiguity as to whether renewal provides a similar reporting

extension. Subsection B of the "Extended Discovery Period" provision (Section IV) of the 99 Policy provides as follows:

> If the Policy is cancelled or not renewed by the Named Insured an automatic thirty (30) day Claims Extension Period shall apply to claims, provided such claims are not covered under any subsequent insurance purchased by the Named Insured, or that would be covered but for the exhaustion of the amount of insurance applicable to such claims.

99 Policy, Sect. IV (B). Cast Steel chose neither of the two options above, but rather renewed the 99 Policy in the following year. Neither this section, nor any section of the 99 Policy, however, discusses whether a similar reporting extension accompanies renewal of the policy. Accordingly, Admiral counters that the policy's silence can only mean that the same reporting extension does not accompany renewal.

The district court, siding with Admiral, did not find any ambiguity in the 99 Policy. Granting summary judgment in Admiral's favor, the district court relied on the Southern District of Florida's 2001 Pantropic decision in finding that renewal of the 99 Policy did not extend the time in which Cast Steel could report its claim. *Pantropic Power Prods., Inc. v. Firemen's Fund Ins. Co.*,141 F. Supp. 2d 1366 (S.D. Fla 2001). In *Pantropic*, which was affirmed by this Court in an unpublished *per curiam* opinion, the plaintiff offered, and the district court rejected, the identical argument to Cast Steel's here. The court in *Pantropic*, in granting insurer's motion for

summary judgment, explained that because an insurer undertakes a more limited risk in a claims-made policy, it typically charges a lower premium. *Id.* at 1369. In exchange, the insured is only permitted to make and report a claim during a narrow window of time. Significantly, in the policy at issue in *Pantropic*, that time included the expressed policy period plus a 60-day grace period. *Id* at 1370. Because the *Pantropic* plaintiff submitted its claim 16 days after the 60-day grace period expired, it was not entitled to coverage even though it had renewed its policy for consecutive years with insurer. *Id.* at 1369-70.[5]

This Court was able to identify only one case in which a court, when faced with a nearly-identical factual scenario, found in favor of the insured. In *Helberg*, the Sixth District of Ohio determined that a claim accruing during Year 1 of a claims-made policy, but not reported until the Year 2 policyperiod (which, like here, was a renewal of year 1), was covered by the *Year 1* policy pursuant to the (albeit ambiguous) reporting extension

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[5] This particular scenario has only been addressed by a few other district courts. In *Ehrgood*, th court reached the same conclusion as the Southern District in *Pantropic*. *Ehrgood v. Coregis Ins. Co.*, 59 F. Supp. 2d 438 (M.D. Pa, 1998). However, in *Ehrgood*, as in *Pantropic*, the Year 1 policy provided the insured a 60-day grace period in which to report claims accruing during the first policy period, and insured reported its claim outside this window. *Id.* at 447. The insurer prevailed in *Checkrite* as well, but the court noted that even if it were to give the insured the benefit of the additional 60- or 90-day grace period contemplated by New York insurance law, the insured reported its claim far outside this time frame. *Checkrite Ltd., Inc. v. Illinois Nat'l Ins. Co.*, 95 F. Supp. 2d 180, 191-194 & n.9 (S.D.N.Y. 2000); *see also Westport Ins. Corp. v. Mirsky*, No. CIV A. 00–4367-, 2002 WL 31018554, at *11 (E.D. Pa. Sept. 10, 2002) (district court reached the same conclusion but was not faced with the extended reporting provision present in this matter).

clause contained therein. *Helberg v. Nat'l Union Fire Ins. Co.*, 657 N.E.2d 832, 833-35 (Ohio Ct. App... 1995).

Plaintiff in *Helberg*, an attorney, initiated litigation against his malpractice insurer ("National"), when National refused to indemnify him in a malpractice action brought by a former client. *Id.* at 833. Plaintiff was undisputedly aware of the claim against him on October 21, 1991, but failed to report the claim to National until January 21, 1992. His 1991 claims-made policy provided coverage from December 11, 1990, to December 11, 1991 - thus he did not report his claim to National until six weeks after the conclusion of the 1999 coverage period. However, plaintiff purchased a renewal of his 1999 policy, which had a retroactive effective date of December 11, 1991, and therefore believed that he was covered by malpractice insurance at all times with National. *Id.* National denied coverage, asserting that the 1991 claim was not covered because it was not reported during the 1991 policy period. *Id.*

The court, recognizing that a claims-made policy requires that notice of action against the insured must be presented to the insurer within the designated time period of the policy, nonetheless found that plaintiff's claim was covered by the 1991 policy. Finding support in the policy's extended reporting endorsement, the court explained:

> In the present case, there was no cancellation of coverage, nor did the insured change insurance carriers. The insured merely renewed his claims-made policy. *Such an event should not precipitate a trap wherein claims spanning the renewal are denied.*

Id. at 834 (emphasis added). The policy at issue in

Helberg, like the policy in our case, did not provide the insured with a grace-period after expiration of the policy to report claims. *Cf. Pantropic*, 141 F. Supp. 2d at 1369. But - and again similar to the 99 Policy here - the *Helberg* policy's extended reporting clause set out only two circumstances when purchase of a reporting extension was necessary to maintain coverage - upon cancellation or non-renewal.[6] *Helberg*, 657 N.E.2d at 835. The Ohio court continued:

> Applying the time-honored maxim of construction, *expressio unius est exclusio alterius*, the inclusion of specific things implies the exclusion of those not mentioned, this court can only conclude that the inclusion of "non-renewal" of the policy as one of those circumstances demanding the purchase of an extended reporting endorsement excludes a "renewal" as a circumstance which demands such a purchase. Since appellant's position here was a renewal rather than a "non-renewal" or "cancellation", this court concludes that the language of the contract does not deny coverage in this context.

Id. at 835.

We concur with the reasoning set forth in *Helberg*. Though we are sympathetic to the rationale of *Pantropic*, and would generally agree that the lower premium

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[6] Note that in *Helberg* the insured was entitled to *purchase* a reporting extension pursuant to the extended reporting clause. Here, the extension was *automatic* upon non-renewal or cancellation.

charged for a claims-made policy should entitle an insured to lesser coverage than a broader, and more expensive, occurrence policy, we find it both illogical and inequitable to deny coverage to the insured who chooses to renew its claims-made policy for successive years with the same insurer - particularly in the scenario we are faced with here. Cast Steel's claim was reported to Admiral mere hours after the expiration of the 99 Policy, and during a time period in which the 00 Policy had become effective. As the *Helberg* court noted, if choosing to cancel or non-renew provided the insured with an extended reporting period, electing to continue to do busness with the same insurer by renewing the claims-made policy certainly "should not precipitate a trap wherein claims spanning the renewal are denied." *Helberg*, 657 N.E. 2d at 834.[7]

It seems to us that the most reasonable interpretation of the extended reporting clause is that it automatically extends the reporting period through renewal. The clause is clearly ambiguous on this point.[8] Accordingly, because we find a clear mandate in Florida

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[7] It is also worth noting that Admiral, unlike the insurer in *Pantropic*, concedes that the 00 Policy was a renewal of the 99 Policy. Thus, the *Pantropic* court's reason for rejecting the logic of *Helberg* - that is, because the policy at issue in *Helberg* specifically contemplated continuous renewal - is not availing here. Admiral does not contend, as the insurer in *Pantropic* did, that the 00 Policy was a separate and distinct policy rather than a renewal of the 99 Policy. Indeed, Admiral refers to the 00 Policy as a "renewal policy" throughout its briefs.

[8] Counsel for Admiral has been unable to explain what the reporting period would be for claims accruing on the last day, or within a very short period, of the conclusion of the policy period. Again, unlike the policy in *Pantropic*, the policy in question provides for no grace period following its expiration for reporting claims.

law to construct a contract of insurance in favor of the insured and strictly against the drafter, we hold that the ambiguity in the 99 Policy must be resolved so as not to deny coverage. *Swire Pacific Holdings,* 845 So. 2d at 165. We find that Cast Steel's renewal of the 99 Policy in 2000 extended the time in which to report the Hibbing claim. As Cast Steel reported the claim immediately after the expiration of the 99 Policy, the district court erred when it denied coverage.[9]

III.

Finally, Cast Steel challenges the district court's failure to require Admiral to refund Cast Steel a $2500 deductible which Admiral collected under the policy. Although the district court determined the deductible was improperly billed, it did not award Cast Steel damages in this amount. However, because we find that the 99 Policy covers the Hibbing claim, a logical outcropping of our decision is that Cast Steel would have been required to pay Admiral the deductible under the policy. Accordingly, Cast Steel is not entitled to a refund of the deductible.

IV.

For the above reasons, we reverse the district court's decision and remand to the district court with instruction to enter summary judgment in Cast Steel's favor on the 99 Policy.

REVERSED and REMANDED with instructions.

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[9] In view of our holding it is not necessary for us to discuss the issue of whether or not there existed genuine issues of material fact on the question of agency. However, for the sake of completeness we state that a review of the record convinces us that such do exist. Based upon the evidence in this record a jury could conclude that Admiral cloaked Ayers/Sierra with the apparent authority to receive claims on its behalf.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FILED
02 OCT 31 AM 10:28
Clerk US District Court
Middle District of Florida
Orlando, Florida

Case No. 6:01-cv-1058-Orl-28-JGG

CAST STEEL PRODUCTS, INC.,
Plaintiff,

-vs-

ADMIRAL INSURANCE COMPANY,
Defendant.

ORDER

Cast Steel Products, Inc. ("Cast Steel"), a manufacturer of pallet cars used in the mining industry, brings this instant action against its liability insurer, Admiral Insurance Company ("Admiral"), seeking declaratory relief and damages. Admiral refused to defend and indemnify Cast Steel for losses it suffered as a result of the failure of wheel bearings in pallet cars Cast Steel sold to one of its customers. Cast Steel initially filed a complaint in state court. (Doc. 2). Admiral removed the action to this Court on diversity grounds (Doc. 1). This Court has jurisdiction pursuant to 28 U.S.C. §1332 and 28 U.S.C. §1442.

The parties have filed summary judgment motions

which are now before the Court.[1] Upon consideration of the record in this matter and pertinent law, the Court concludes that none of Admiral's Insurance policies provides coverage for the claim of Cast Steel. Accordingly, Cast Steel's Motion for Summary Judgment and Motion for Partial Summary Judgement as to Certain Affirmative Defenses (Doc. 31) shall be granted in part and denied in part and Defendant Admiral Insurance Company's Motion for Summary Judgment (Doc. 35) shall be granted.

I. Background

Cast Steel is a business which supplies castings and components to the mining and waste energy industries. In late 1988 or early 1999, Cast Steel bid on and was awarded a contract to provide 130 pallet cars to the Hibbing Taconite Company ("Hibbing") in Minnesota, which produces iron ore pallets. The pallet cars cost $41,850.00 each, for a total purchase price of $5,440,500.00. (Ex. N to Doc. 54). The pallet cars were

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[1] Cast Steel has filed Cast Steel's Motion for Summary Judgment and Motion for Partial Summary Judgment as to Certain Affirmative Defenses (Doc. 31, filed July 3, 2002), in response to which Admiral has filed Defendant Admiral Insurance Company's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Motion for Partial Summary Judgment as to Certain Affirmative Defenses (Doc. 54, filed August 21, 2002). Also before the Court is Defendant Admiral Insurance Company's Motion for Summary Judgment (Doc. 35, filed July 8, 2002), in opposition to which has been filed Cast Steel's Response to Admiral Insurance Company's Motion for Summary Judgment (Doc. 42, filed July 17, 2002). Additionally, with leave of court (Doc. 51), Admiral has submitted Defendant's Reply to Cast Steel Products, Inc.'s Response to Admiral Insurance Company's Motion for Summary Judgment (Doc.53, filed August 21, 2002). The Court also heard oral argument on the motions on October 24, 2002 (Doc. 65).

installed at the Hibbing mine over a four-month period, and installation was completed in June 1999. However, in mid-to late August 1999, Cast Steel learned from Hibbing of a problem with the wheels of the pallet cars. Ultimately it was determined that the problem stemmed from the design of the bearings in the wheels.

Beginning in 1999, Cast Steel had obtained Admiral liability insurance policies. Doug Poland, the president of Cast Steel, explained in his deposition that he consulted and obtained advice about Cast Steel's insurance needs from Bob Harding at Ayers/Sierra Insurance Associates (Doc. 41 at 9-10). Based on Harding's recommendation, Cast Steel obtained general liability and professional liability insurance. (Doc. 41 at 10). Mr. Harding did not tell Mr. Poland that he worked for Admiral, but Mr. Poland viewed Ayers/Sierra and Admiral as the same. (Doc. 41 at 11).

Bob Harding of Ayers/Sierra testified in his deposition that he obtained surplus lines insurance for Cast Steel because non-standard insurance was not available due to the nature of Cast Steel's business. (Doc. 37 at 9, 13). Ayers/Sierra was not a surplus lines broker, so Harding had to contact a surplus lines broker, Gary Markel Surplus Lines, to procure insurance for Cast Steel. (Doc. 37 at 10). Harding met with Doug Poland of Cast Steel in the fall of 1999 regarding Cast Steel's insurance needs. (Doc. 37 at 10-11). Harding did not represent to Poland that he was an agent for Admiral. (Doc. 37 at 11).

One of the Admiral policies that Cast Steel obtained was a Commercial General Liability insurance policy for the policy period January 6, 1999 to January 6, 2000 at 12:01 a.m. ("the CGL policy"). (Policy No.

A99AG05841, Ex. A to Doc. 35). Subject to several exclusions, the CGL policy provides that Admiral "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (Ex. A to Doc. 35 at 2 ¶1.a. ("Commercial General Liability Coverage Form")). The CGL policy further provides that the "bodily injury" or "property damage" [must] occur [] during the policy period" in order to be covered. (Ex. A to Doc. 35 at 2 ¶1.b.(2)). Among the exclusions to the CGL policy is Exclusion k, which provides that the insurance does not apply to '[p]roperty damage' to 'your product' arising out of it or any part of it". (Ex. A to Doc. 35, at 5 ¶k). "Your product" is defined in the policy as "[a]ny goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by "Cast Steel. (Ex. A to Doc. 35 at 17 ¶20.a.)

Cast Steel also obtained Professional Liability Insurance from Admiral for the policy period January 6, 1999 to January 6, 2000 ("the 1999 PL policy"). (Policy Number A99PL06934, Ex. B to 35). The 1999 PL policy provides in part as follows:

> II. COVERAGE - PROFESSIONAL LIABILITY
>
> A. INSURING AGREEMENT
> The Company agrees to pay on behalf of the Insured those sums which the Insured shall become legally obligated to pay as damages by reason of any negligent act or error or omission in professional services rendered, or which should have been rendered, subsequent to the retroactive date specified in the

Declarations, by an Insured, or by any other person for whose acts the Named Insured is legally liable, arising out of the conduct of the Named Insured's business as described in the Declarations.

B. CLAIMS MADE CLAUSE

This policy applies to CLAIMS FIRST MADE AGAINST THE INSURED AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD arising from services rendered, or alleged to have been rendered anywhere in the United States of America, its territories or possessions:

(1) during the policy period, or

(2) prior to the effective date of this insurance and subsequent to the Retroactive Date specified in the Declarations provided that:

(a) The insured had no knowledge of any claim or suit, or any act or error or omission, which might reasonably be expected to result in a claim or suit as of the date of signing the application for this insurance; and

(b) there are no other certificates or policies pursuant to which the insured is afforded any coverage for such claim or suit.

(Policy No. A99PL06934, at "1 of 6" on "Claims-Made Form," Ex. B to Doc. 35) (emphasis in original). The first page of that policy includes a stamped paragraph stating in part that "the coverage of this policy is limited generally to liability for only those claims that are first made against the insured while the policy is in force". (Policy No. A99PL06934, at 1). Cast Steel also obtained a Professional Liability policy from Admiral for the term January 6, 2000 to January 6, 2001 at 12:01 a.m. ("the 2000 PL policy") which contained these same provisions. (Policy No. A00PL09927, Ex. C to Doc. 35).

In September 1999, Doug Poland of Cast Steel advised Bob Harding of Ayers/Sierra that Hibbing was having problems with some of the pallet car wheels. (Doc. 41 at 32). At first, Cast Steel did not want to make an insurance claim because it was concerned about jeopardizing its relationship with its customer, Hibbing. (Doc. 41 at 34). However, by early November 1999, Cast Steel realized that the replacement cost for the wheels necessitated the making of an insurance claim. (Doc. 41 at 35). Mr. Poland spoke to Bob Harding again in late November and advised him that Cast Steel needed to make a claim. (Doc. 41 at 35). Harding assured Poland that it would be handled. (Doc. 41 at 35).

Harding recalled talking to Doug Poland about the wheel bearing problem at Hibbing as early as late October 1999, and Harding spoke to Poland about the Hibbing matter again in mid- November 19999. (Dep. of Robert Harding, Doc. 37 at 30-31). Harding testified in his deposition that sometime around Thanksgiving 1999 he wrote a note to Jodi Fagan, the claims specialist at Ayers/Sierra, to file a claim for Cast Steel based on the

Hibbing problem. (Dep. of Robert Harding, Doc. 37 at 54-56). According to Harding, the claim should have been made within the same day he wrote the note to Fagan. (Dep. of Robert Harding, Doc. 37 at 58).

However, Ayers/Sierra did not submit the claim until the afternoon of January 6, 2000 after the 19999 PL policy had expired a 12:01 a.m. on that date. Ms. Fagan testified in her deposition that the first time she had learned of Cast Steel's claim - and indeed the first time she was even aware of the a company called Cast Steel - was on January 6, 2000, when Harding mentioned it to her. (Dep. of Jodi Fagan, Doc. 39 at 15). Fagan obtained information about the claim from Doug Poland on the telephone, and she then filled out an ACORD form and faxed it to the surplus lines broker, Markel. (Dep. of Jodi Fagan, Doc. 39 at 16, 32; Ex. Y to Doc. 5; Dep. of Doug Poland, Doc. 41 at 36). The claim was faxed to the broker, Markel, rather than to Admiral directly because that is the standard procedure at Ayers/Sierra. (Dep. of Jodi Fagan, Doc. 39 at 27). Admiral then received the claim notice from Markel. (Dep. of Edward Howley, Doc. 34 at 33). In making the claim, Poland did not deal with anyone except Harding and Fagan of Ayers/Sierra, and he did not have any conversations with anyone at Gary Markel Surplus Lines. (Dep. of Doug Poland, Doc. 41 at 37).

The claim that was filed on Cast Steel's behalf by Fagan was made under the CGL policy rather than the 1999 PL policy of the 2000 PL policy (Ex. Y to Doc. 54). Fagan testified in her deposition that when she was gathering the information from Poland about the claim on January 6, 2000, the computer brought up a list of Cast Steel's policies and she selected the CGL policy from the

list. (Dep. of Jodi Fagan, Doc. 39 at 49-50). The fax cover sheet that Fagan sent to the broker, Markel, states in part, "Attached please find general liability loss notice regarding this claim," and refers to the CGL Policy by its number, A99AG05841. (Ex. Y to Doc. 54). There are different ACCORD forms for different policies, and the ACORD form that Fagan submitted is labeled "General Liability Notice of Occurrence/Claim"(Dep. of Jodi Fagan, Doc 39 at 25; Ex. Y to Doc. 54). The ACORD form refers to the CGL policy by number (A99AG05841) and type (occurrence) and states the date of occurrence as 10/20/99. (Ex. Y to Doc. 54).

In a letter dated February 14, 2000, Admiral advised Cast Steel that it had received the loss notice regarding Hibbing Taconite. (Ex. C. to Doc. 31). The letter referenced only the CGL policy, and in the letter Admiral advised that its "involvement in this matter must be considered to be under a full reservation of the [sic] Admiral's rights at law and under the policy, which includes but is not limited to, the right to disclaim, dispute and/or deny coverage both as to defense and indemnity." (Ex. C to Doc. 31 at 4).

On February 10, 2000, Admiral hired an independent insurance claims adjuster, James Sineath of Custard Insurance Adjusters, to document Cast Steel's claim and issue a report. (Dep. of James Sineath, Doc. 33 at 5-8). On February 22, 2000, Doug Poland of Cast Steel sent a letter to Admiral referencing the CGL policy, stating that Cast Steel was working with the adjuster, Jim Sineath, and summarizing the claim. (Ex. 4 to Doc. 34). The letter noted that Cast Steel had been expending substantial sums to remedy the problem with Hibbing and requested an advance from Admiral in order to

alleviate the cash flow problems Cast Steel was experiencing due to its attempted remediation of the wheel failures. (Ex. 4 to Doc. 34). Admiral did not respond to this letter. (Dep. of Edward Howley, Doc. 34 at 30).

On March 2, 2000, Admiral received a letter from Jim Sineath stating that Poland felt the claim was covered by either the CGL policy or a PL policy. (Dep. of Edward Howley, Doc. 34 at 23-24). On April 11, 2000, Mr. Sineath sent a letter to Mr. Poland requesting documentation regarding parts and amounts spent in remediation at Hibbing. (Ex. 5 to Doc. 34). On April 11, 2000, Mr. Poland responded to Mr. Sineath's letter by providing explanations for the expenditures; in his letter, Mr. Poland informed Mr. Sineath of the cash flow problems Cast Steel was having due to the expenditures in attempting to solve the problem at Hibbing. (Ex.6 to Doc. 34). Mr. Sineath responded in another letter on April 26, 2000, requesting more information about the Hibbing claim. (Ex. 7 to Doc. 34). Mr. Poland wrote to Mr. Sineath again on May 3, 2000, (Ex. 8 to Doc. 34), and Mr. Sineath responded on May 18, 2000, again requesting more documentation of expenses. (Ex. 9 to Doc. 34).

On June 29, 2000, Ted Howley of Admiral sent Mr. Poland a letter referencing the three Admiral policies (the CGL policy, the 1999 PL policy, and the 2000 PL policy) and explaining that Admiral was denying coverage under all three policies. (Ex. 10 to Doc. 34). In that letter, Mr. Howley stated that Admiral was denying coverage under the CGL policy based on Exclusion k - the "Damage to Your Product" exclusion - as well as based on the voluntary payments made by Cast Steel to Hibbing prior to Admiral's receipt of the notice of loss.

(Ex. 10 to Doc. 34, at 4). Other exclusions in the CGL policy were also noted. (Ex. 10 to Doc. 34, at 5).

As to the PL polices, Admiral took the position in June 29, 2000 letter that there was no coverage under the 1999 PL policy because the claim was not reported to Admiral during the policy period, which expired at 12:01 a.m. on January 6, 2000. (Ex. 10 to Doc. 34, at 6). Additionally, Admiral denied coverage under the 2000 PL policy because the claim was not first asserted by Hibbing against Cast Steel during that policy period and because Cast Steel had knowledge of Hibbing's claim prior to the start of the policy period. (Ex. 10 to Doc. 34, at 6).

Unable to resolve its dispute with Admiral, Cast Steel filed suit. In its Complaint, (Doc. 2), Cast Steel alleges six counts: Count I for declaratory relief regarding the CGL policy; Count II for declaratory relief regarding the 1999 PL policy; Count III for declaratory relief under the 2000 PL policy; Count IV for declaratory relief (estoppel and statutory waiver); Count V for damages for breach of the 1999 PL policy; and Count VI for damages for breach of the 2000 PL policy.

II. Legal Discussion

A. Summary Judgment Standards

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions to file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The

moving party bears the burden of establishing that no genuine issues of material fact remain. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In ruling on a motion for summary judgment, "[t]he function of the court is not to weigh the evidence and determine the truth of the matter but to determine whether there is an issue for trial." *Lockett v. Wal-Mart Stores, Inc.*, No. Civ.A. 99-0247-CB-C, 2000 WL284295, at *2(S.D. Ala. Mar. 8, 2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

B. The Merits of the Parties' Motions

i. Cast Steel's Motion for Summary Judgment (Doc. 31)

In its motion (Doc. 31), Cast Steel seeks summary judgment on Counts II and V of the Complaint, which pertain to the 1999 PL policy, as well as partial summary judgment on several of Admiral's affirmative defenses. In arguing its entitlement to summary judgment based on the 1999 PL policy, Cast Steel contends that notice of the Hibbing claim that it gave to Ayers/Sierra by November 1999 constitutes notice to Admiral. Simply stated, Cast Steel contends that Ayers/Sierra was Admiral's agent and that therefore notice to Ayers/Sierra was effective notice to Admiral under the policy.

In arguing that Ayers/Sierra was Admiral's agent, Cast Steel relies in part on *Almerico v. RLI Insurance Co.*, 716 So.2d 774 (Fla. 1998). In *Almerico*, the Florida Supreme Court addressed the issue of agency in the insurance context:

> As a general principle, an insurance broker is an agent of the insured.
>
> However, it is equally well settled that the

> insurance broker may act in the dual capacity of he broker for the insured and agent of the insurer. Accordingly, a determination that a particular agent is an insurance broker may not conclude the issue of agency relationship. In fact, the petitioners contend here that there is an issue of statutory agency, as well as issues of actual or apparent authority based on the conduct of the insurer, RLI.
>
> Florida case law provides that an insurer may be held accountable for the actions of those whom it cloaks with "apparent agency." Further, review of the case law on agency indicates that evidence of *indicia* agency may be demonstrated if the insurer furnishes an insurance agent or agency with "any blank forms, applications, stationery, or other supplies to be used in soliciting, negotiating, or effecting contracts of insurance."....
>
> Recent cases have applied a three-prong test under general agency law in order to determine the existence of apparent agency: first, whether there was a representation by the principal; second, whether a third party relied on that representation; and, finally, whether the third party changed position in reliance upon the representation and suffered detriment.

716 So.2d at 776-77 (citations and footnote omitted) (emphasis in original).

In support of its argument that Ayers/Sierra was

Admiral's agent and that therefore notice to Ayers/Sierra within the 1999 policy was effective as notice to Admiral under the 1999 PL policy, Cast Steel argues that a stamp on the face of the policy identifies Ayers/Sierra as the "producing agent." (Ex. B to Doc. 31, at 1). The stamp to which Cast Steel refers contains several lines with handwritten information added; it lists Gary Markel as the surplus agent's name and Steve Ayers [of Ayers/Sierra] as the producing agent. (Ex. B to Doc. 31). However, in his deposition Bob Harding, who worked for Ayers/Sierra at all times relevant to this case, testified that either Ayers/Sierra or the broker, Markel, put the stamp on the policy. (Dep. of Robert Harding, Doc. 37 at 15). Harding explained that because Gary Markel had signed the stamped signature line, Markel must have placed the stamp on the policy. (Doc. 37 at 42-43). However, there is no evidence that Admiral put this stamp on the policy, and thus this stamp does not amount to a representation of Admiral that Ayers/Sierra was its agent.

Cast Steel also contends that Admiral provided Ayers/Sierra with applications bearing Admiral's name and accepted business generated by Ayers/Sierra, and that these actions render Ayers/Sierra Admiral's agent. However Admiral correctly responds that there is no record evidence that Admiral provided applications to Ayers/Sierra. Rather, the evidence reflects that Ayers/Sierra obtained the applications and forms from the surplus lines broker, Markel, and that Markel then provided the documents to Ayers/Sierra. Thus, Cast Steel's apparent agency argument based on the alleged provision by Admiral of documents to Ayers/Sierra is without merit. Additionally, Cast Steel's reliance on

Doug Poland's deposition testimony that he believed Ayers/Sierra was Admiral's agent is misplaced, as Mr. Poland's belief is not relevant absent some representation by the insurer that could have created that belief. There is no evidence that Admiral may any such representation.

In addition to its agency argument, Cast Steel also contends in its motion that the 1999 PL policy did not require that Admiral be notified of the claim during the policy period. Cast Steel avers that the stamped "notice" on the first page of the policy modified the policy to require only notice by Hibbing to Cast Steel during the policy period and not also notice by Cast Steel to Admiral during the policy period. The stamped "notice" upon which Cast Steel relies states:

> NOTICE
>
> Except to such an extent as may otherwise be provided herein, the coverage of this policy is limited generally to liability for only those claims that are first made against the insured while the policy is in force. Please review the policy carefully and discuss the coverage thereunder with your insurance agent or broker.

(Ex. B to Doc. 35, at 1). Cast Steel contends that this "notice" language is inconsistent with, modifies, and trumps, the "CLAIMS MADE CLAUSE" of the policy, which provides that "[t]his policy applies to CLAIMS FIRST MADE AGAINST THE INSURED AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD." (Ex. B to Doc. 35).

Cast Steel correctly notes that stamped provisions in a contract control over inconsistent printed provisions. See, e.g., *Burdines, Inc. v. Pan-Atl. S.S. Corp.*, 199 F.2d 571, 573 (5th Cir. 1952) ("It is a well established general rule that when a contract is partly printed and partly written, the writing controls. This rule extends to the use of a rubber stamp as a means of writing."). In this case, however, the plain wording of the language in the stamped notice and the text of the policy does not reveal an inconsistency. Although the stamped notice mentions only claims being made against the insured, it does not alter the policy requirement that the claim be reported to Admiral during the policy period. There is nothing inconsistent about these two provisions, especially considering that the stamped notice begins, "[e]xcept to such an extent as may be otherwise provided herein." Thus, there is no "ambiguity" for this Court to construe.

In sum, Cast Steel's motion for summary judgment on Counts II and V shall be denied. There is no record evidence to support a finding that Ayers/Sierra was Admiral's actual or apparent agent, and the stamped notice provisions on the policy does not alter the requirement that the claim be reported to Admiral during the policy period.

Also in its summary judgment motion, Cast Steel seeks "partial" summary judgment on several of Admiral's affirmative defenses; specifically, Cast Steel seeks summary judgment on several of Admiral's affirmative defenses; specially, Cast Steel seeks summary judgment in its favor on Admiral's First, Second, Fifth, and Sixth Affirmative Defenses. Admiral has not responded to the arguments as to the First and Fifth

Affirmative defenses, both of which relate to whether the claim arose from "professional services." Cast Steel's motion will be granted as to these two affirmative defenses.

Admiral's Second Affirmative Defense relates to Exclusion k (the "your product" exclusion). Cast Steel argues in its motion that this exclusion only relates to the CGL policy rather than to the PL policies, and in its response Admiral concedes this point. Therefore, Cast Steel's motion will be granted insofar as it seeks a declaration that Exclusion k pertains only to the CGL policy.

Admiral's Sixth Affirmative Defense relates to voluntary payment by Cast Steel of sums claimed by its customer, Hibbing. Cast Steel contends that Admiral is precluded by statute from asserting this defense and that Admiral was not prejudiced by any voluntary payments made by Cast Steel to Hibbing. In light of the Court's conclusion, on the merits of Admiral's motion for summary judgment as to the existence of coverage as set forth below, the Court finds it unnecessary to reach this issue, and this portion of Cast Steel's motion shall be denied as moot.

ii. Admiral's Motion for Summary Judgment (Doc. 35)

In its summary judgment motion (Doc. 35), Admiral contends that there is no genuine issues of material fact as to the lack of coverage under any of the three insurance policies and that therefore summary judgment should be entered in Admiral's favor. Admiral, on the other hand, argues that Cast Steel

plainly failed to comply with the notice requirements of the 1999 PL Policy and thus that the policy does not cover the claim. Additionally, Admiral notes that because Hibbing made a claim against Cast Steel prior to the start of the 2000 policy period, the 2000 PL policy does not cover the claim. Further, as to the CGL policy, Admiral argues that no actual case or controversy exists because Hibbing has not made a claim against Cast Steel that would be covered by that policy. Finally, Admiral avers that it has not waived any defenses nor is it estopped from denying coverage.

a. The 1999 PL Policy

Admiral is correct that there is no genuine issue as to material fact as to whether there is coverage under the 1999 PL policy. By its plain terms, the 1999 covers "claims first made against the insured and reported to the Complaint [Admiral] during the policy period." The policy period of the 1999 PL policy ran from January 6, 1999 until 12:01 a.m. on January 6, 2000. It is undisputed (aside from Cast Steel's theory that Ayers/Sierra was Admiral's agent, discussed above in the context of Cast Steel's motion) that, although Hibbing first made the claim against Cast Steel during the 1999 PL policy period, the Hibbing claim was not reported to Admiral until after the expiration of this policy on January 6, 200. As correctly noted by Admiral in its motion, this Court may not extend the reporting period in order to expand the scope of the policy's coverage. See, e.g., *Pantropic Power Prods., Inc. v. Fireman's Fund Ins. Co.*, 141 F. Supp. 2d 1366, 1369 (S.D. Fla. 2001), aff'd, 34 Fed. Appx. 968 (11th Circ. 2002).

Although Cast Steel characterizes the failure to

report the claim to Admiral during the policy period as a "technical breach," (Doc. 42 at 3), the lack of reporting is not a mere technical material but instead relates to the very nature of this type of insurance policy. See, e.g., *Pantropic*, 141 F. Supp at 1369 ("In essence, coverage is "triggered" by the insured's discovery of the claim and the provision of notice to the insurer within the policy term."). Additionally, Cast Steel's contention that the requirement that the claim be reported to Admiral during the policy period conflicts with the "as soon as practicable" notice provision of the policy is without merit. See generally 13 Couch on insurance § 186:13 (3d ed. 200) ("As a general statement, the prompt notice of claim requirement and the 'claims made' within the policy period requirement serve such different purposes, and are of such different basic character, that the principles applied to one should have little or nothing to do with the principles applied to the other."). The only argument that Cast Steel makes regarding coverage under the 1999 PL policy relates to the rubber stamp that allegedly modifies the policy terms; however, this argument has been rejected by the Court as discussed above in connection with Cast Steel's summary judgment motion. In sum, Admiral is entitled to summary judgment regarding the lack of coverage under the 1999 PL policy.

b. The 2000 PL Policy

Admiral argues that there is clearly no coverage under the 2000 PL policy because the claim was first made by Hibbing against Cast Steel prior to the inception of the policy period. Indeed, the record evidence reflects that Cast Steel was altered to the Hibbing claim as early as August 1999, several months before the inception of

the 2000 PL policy period in January 2000. Additionally, Admiral correctly notes that Cast Steel failed to list the Hibbing claim on its renewal application in connection with obtaining the 2000 PL policy.

Although Cast Steel argues in its response that Hibbing continued to make claims against Cast Steel during the 2000 policy period as the pallet car wheels continued to fail, Admiral is correct that there was only one claim under the terms of the policy. The policy plainly provides:

> MULTIPLE INSUREDS,CLAIMS AND CLAIMANTS:... Two or more claims arising out of a single negligent act or error or omission or a series of related negligent acts or errors or omissions shall be treated as a single claim. All such claims, whenever made, shall be considered first made and reported to the Company during the policy period in which the earliest claim arising out of such negligent acts or errors or omissions was first made and reported to the Company and all such claims shall be subject to the same limit of liability.

(Ex. C to Doc. 35, at "VII. Limit of Liability"). The Hibbing claims all arose out of a single negligent act related to the design of the pallet car wheels. Because Hibbing first made a claim to Cast Steel during the 1999 policy period and because there is only a single negligent act, notwithstanding that Hibbing may have continued to make claims during 2000 there is only one claim.

There is no coverage under the 2000 PL policy, and Admiral is entitled to summary judgment on this point.

(c) The CGL Policy

Admiral correctly argues that Cast Steel has not alleged a cognizable claim under the 1999 CGL policy. Cast Steel concedes that Exclusion k of the policy bars coverage for remediation costs related to the pallet cars that Cast Steel sold to Hibbing. However, Cast Steel contends that the CGL policy provides coverage for a hypothetical claim by Hibbing for lost production time, which would not be excluded by Exclusion k of the CGL policy. Although Cast Steel has submitted the deposition of Paul Carlson of Hibbing (Doc. 49), in which Mr. Carlson makes some very vague references to Hibbing's lost production time due to having to repair or replace the defective pallet car wheels, it is clear from the record that Hibbing has not made a claim to Cast Steel for lost production and that Cast Steel has never made notice of such a claim to Admiral. Admiral acknowledged during oral argument that the lost production would likely be covered by the CGL policy, but no such claim is at issue in this suit. Accordingly, Admiral is entitled to summary judgment as to the CGL policy.

(d) Estoppel

Finally, Admiral argues it is entitled to summary judgment on Cast Steel's estoppel and statutory waiver claim in Count IV of the complaint. In this Count, Cast Steel contends that by investigating the claim and billing Cast Steel for a $2500 deductible, Admiral gave Cast Steel the impression that there was coverage for the claim and therefore Admiral is estopped to deny coverage.

In support of its estoppel argument, Cast Steel relies on *Crown Life Insurance Co. v. McBride,* 517 So. 2d 660 (Fla. 1987), and *American States Insurance Co. v. McGuire,* 510 So. 2d 1227 (Fla. 1st DCA 1987), wherein exceptions were recognized to the rule that estoppel may not be invoked to create insurance coverage. However, as explained in *Aetna Casualty and Surety Co. of America v. Deluxe Systems, Inc. of Florida,* 711 So. 2d 1293, 1296 (Fla. 4th DCA 1998), "*McBride* applies to create insurance coverage *only* where the insured is misled in connection with the initial acquisition of insurance" (emphasis in original). *McBride* and *American States* do not alter the general rule of law that "[e]stoppel based upon the conduct of the insurer... may not be used to affirmatively create or extend insurance coverage beyond that set forth in the policy." *Tradewinds Constr. V. Newsbaum,* 606 So. 2d 708, 709, (Fla. 1st DCA 1992).

Admiral was given notice of Cast Steel's claim in January 2000 when Markel, the surplus line broker, forwarded the notice. The notice was made under the 1999 CGL policy. In February 2000, Admiral sent Cast Steel a reservation of rights letter and hired an adjuster, Jim Sineath, to investigate the claim. Ultimately, Admiral determined that Exclusion k to the CGL policy barred coverage because the pallet cars were Cast Steel's product and that there was no coverage under either of the PL policies because the claim was not both made and reported during either the 1999 policy period or the 2000 policy period.

Cast Steel contends that Admiral first advised if of defenses to the PL policies in June 2000 and that because Cast Steel had not been told of any defenses to the PL

policy coverage until that point, Admiral could not raise them for the first time in June 2000. In Admiral's February 2000 letter, Cast Steel notes, Admiral only referred to the CGL policy. However, the only claim notice that had been sent to Admiral had referenced the CGL policy rather than either of the PL policies. Cast Steel never advised Admiral of any claimed coverage under the PL policies, although the adjuster, Mr. Sineath, apparently informed Admiral of the potential coverage under the PL policies in March 2000. Cast Steel's reliance on Admiral's reference in the February 2000 reservation of rights letter to only the CGL policy is misplaced, as Admiral had not been advised of any potential coverage under the PL policies. Admiral properly reserved its rights under the only policy as to which a claim had been filed. In any event, Admiral ultimately denied coverage under the PL policies based not on a coverage defense but on a total lack of coverage due to the timing of the reporting of the claim. *Cf.Atl. Cas & Fire Ins. Co. v. Nat'l Am. Ins. Co.*, 915 F. Supp. 1218 (M.D. Fla. 1996)(noting Florida Supreme Court decision holding that "coverage defense" means "a defense to coverage that otherwise exists" and does not "include a disclaimer of liability based on a complete lack of coverage for the loss sustained")(quoting *AIU Ins. Co. v. Block Marina Invoice # ., Inc.*, 544 So. 2d 998, 1000 (Fla. 1989)).

Moreover, Cast Steel's argument that it suffered detriment due to Admiral's actions is without merit. The record evidence shows that Cast Steel worked with its customer, Hibbing, regarding the wheel design problem so that Hibbing would be happy and would place its second order for pallet cars with Cast Steel. Cast Steel's claim that it kept expending money because it was

relying on Admiral to reimburse it rings hollow; Cast Steel had to remedy the problem regardless of coverage.

Finally, in support of its estoppel argument Cast Steel relies on the fact that Admiral billed and collected from Cast Steel a $2500 deductible for its expenses in investigating the claim. The Court finds no basis under the CGL policy for the billing for the $2500 deductible. Although Admiral has cited policy provisions which allegedly provide for such billing, the Court does not read those provisions to allow for billing to the insured absent coverage. Moreover, Admiral's representative, Ted Howley, testified that the deductible should not have been billed to Admiral. (Doc. 34 at 57). However, the erroneous billing of the billing of the $25000 does not result in estoppel for the reasons discussed above as to the rest of Cast Steel's estoppel arguments, and Cast Steel has not cited any authority in support of its argument that the billing of the deductible results in estoppel as to coverage. Hence, Admiral is entitled to summary judgment on Cast Steel's estoppel and waiver argument notwithstanding the lack of support for the billing of the deductible amount to Cast Steel.

III. Conclusion

The Court is not unsympathetic to Cast Steel's plight. It appears from the record that Cast Steel acted appropriately in obtaining coverage and in timely reporting its claim to its agent, Ayers/Sierra. Unfortunately, for whatever reason, apparently Ayers/Sierra did not ensure that the claim was timely reported to Admiral. Nevertheless, this Court is powerless to find insurance coverage where none exists under settled law. Therefore, in accordance with the

foregoing analysis, it **ORDERED** as follows:

1. Cast Steel's Motion for Summary Judgment and Motion for Partial Summary Judgment as to Certain Affirmative Defenses (Doc. 31) is **GRANTED** in part and **DENIED** in part. The motion is **GRANTED** insofar as it seeks partial summary judgment as to Admiral's First and Fifth Affirmative Defenses. The motion is also **GRANTED** insofar as it seeks a declaration that Exclusion k (the "your product" exclusion) relates only to the CGL policy and not the PL policies. In all other respects, Cast Steel's motion is **DENIED.**

2. Defendant Admiral Insurance Company's Motion for Summary Judgment (Doc. 35) is **GRANTED.**

3. All other pending motions are **DENIED as moot.**

4. The Clerk is directed to enter judgment for Defendant Admiral Insurance Company in accordance with this Order and thereafter to close this file.

DONE and **ORDERED** in Orlando, Florida this 31 day of October, 2002.

JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 29 2003
THOMAS K. KAHN
CLERK

NO. 02- 16511-DD

CAST STEEL PRODUCTS, INC.,
Plaintiff – Appellant,

versus

ADMIRAL INSURANCE COMPANY,
Defendant - Appellee.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, ____F. 2d_____).

Before: BLACK and FAY, Circuit Judges, and JORDAN*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the

Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

*Honorable Adalberto J. Jordan , United States District Judge for The Southern District of Florida, sitting by designation.

(2)

Supreme Court, U.S.
FILED
APR 26 2004
OFFICE OF THE CLERK

No. 03-1360

IN THE

Supreme Court of the United States

ADMIRAL INSURANCE COMPANY,

Petitioner,

v.

CAST STEEL PRODUCTS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Circuit erred in its application of the doctrine of *contra proferentem* when interpreting, pursuant to Florida law in a diversity case, the insurance policy issued by the Petitioner to the Respondent?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Cast Steel Products, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Rule:

U.S. Sup. Ct. R. 10 3

STATEMENT OF THE CASE

a. *Procedural History*

Respondent Cast Steel Products, Inc., ("Cast Steel"), takes little exception with the procedural history as set forth by Petitioner, Admiral Insurance Company, ("Admiral"). However, where Admiral indicates that "[t]his proceeding begin as a lawsuit initiated by the respondent," (petition at p. 3), that statement, for sake of accuracy and completeness, should indicate that the proceeding began as a lawsuit initiated by Cast Steel in the State Courts of Florida, and in particular in the Florida Circuit Court in and for the Seventh Judicial Circuit, in and for Volusia County, Florida. The case was then removed by Admiral to the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. § 1441 (2000), premised upon diversity of citizenship under 28 U.S.C. § 1332 (2000).

Admiral also indicates that "[n]otably, however, Cast Steel *did not appeal* from the District's Court's denial of its Motion for Summary Judgment" (petition at p. 3). Technically this is a correct statement, but it should be noted that Cast Steel noticed its appeal to the Eleventh Circuit from a Final Judgment of the United States District Court pursuant to 28 U.S.C. § 1291 (2002).

b. *Facts of Case*

For purposes of the this petition only, Cast Steel takes no major exceptions to the facts of the case as set forth in Admiral's Petition. Cast Steel would, however, direct this Court's attention to the opinion of the United States Court of Appeals for the Eleventh Circuit in *Cast Steel Products*,

Inc. v. Admiral Ins. Co., 348 F.3d 1298 (11th Cir. 2003), for a complete and comprehensive statement of the facts. The Eleventh Circuit's opinion is also Appendix 1 to Admiral's Petition.

REASONS FOR DENYING THE PETITION

The decision of the Eleventh Circuit Court of Appeals concerns interpretation of an insurance policy, pursuant to Florida law, in a diversity case. Review of such matters is something this Court has, on previous occasions, refused to do absent 'compelling reasons.' Though important to the Petitioner and Respondent, from the perspective of the Federal Court system this case is a simple garden variety diversity case. Quite simply, to the extent the decision below conflicts with any decisions of other Federal Circuits, it does so only in result, as each opinion was applying the law of different states in diversity cases. No conflict is presented as to application of substantive Federal Law or any Federal Rule of Civil Procedure or Federal Rule of Evidence.

Contrary to Admiral's claims, the decision below does not conflict with a decision of this Court, any Court of Appeals, or any State Court, because none of the opinions Admiral claims conflict with the decision below involved interpretation of the same contract language which the Eleventh Circuit reviewed. Likewise, the facts and circumstances of those cases differed from this case. Simply put, because the cases cited by Admiral did not involve similar facts and similar contract language no conflict is presented. Furthermore, there is no conflict between the decision below and the cases cited by Admiral because in each case the court looked for ambiguities in the contract to determine if application of the time-honored doctrine of

contra proferentem was necessary. Therefore, though the results of the cases may have differed, the approach taken by the Courts in the cited opinions was identical to the approach the Eleventh Circuit applied.

Lastly, Cast Steel would note that Admiral's petition seems to invite this Court to enter the arena of creating a Federal Common Law as to interpretation of insurance policies. Long ago, both this Court and the Congress indicated that the business of insurance would be left to the individual states.

I. This Court Typically Does Not Grant Petitions For Certiorari Which Ask This Court To Solely Review Applications Of State Law By Circuit Courts In Diversity Jurisdiction Cases.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* As to cases in which the Circuit Court has applied state law in a diversity action, this Court has indicated that it does "not normally grant petitions for certiorari, solely to review what purports to be an application of state law" unless the case is an "extraordinary case[s]." *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996). This Court's reluctance to grant petitions for certiorari in diversity cases applying state law pursuant to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) is in accord with this Court's "general presumption that courts of appeals correctly decide questions of state law." *Leavitt*, 518 U.S. at 145.

Admiral's petition is from an opinion of the Eleventh Circuit which interpreted an insurance contract pursuant to Florida law. *Cast Steel Products, Inc. v. Admiral Ins. Co.*, 348 F.3d 1298, 1300 (11th Cir. 2003). The Eleventh Circuit, in interpreting the policy of insurance, was simply applying Florida law pursuant to *Erie Railroad*. Admiral, however, contends that the opinion of the Eleventh Circuit "is in Direct Conflict with Every United States Court of Appeals on this Same Important Matter . . ." (Admiral's Petition at p.6) citing opinions of the First Circuit, *Nat. Union Fire Ins. Co. v. Talcott*, 931 F.2d 166 (1st Cir. 1991) the Fifth Circuit, *Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co.*, 174 F.3d 653 (5th Cir. 1999), the Sixth Circuit, *United States v. A.C. Strip*, 868 F.2d 181 (6th Cir. 1989), and the Seventh Circuit, *Nat. Union Fire Ins. Co. of Pittsburgh v. Baker & McKenzie*, 997 F.2d 305 (7th Cir. 1993). There are, *inter alia*, two fundamental problems with Admiral's argument, both of which demonstrate why this Court should deny Admiral's Petition.

First, the Eleventh Circuit was, as noted, interpreting the language of a contract, an insurance policy, under Florida law in an appeal from a Final Judgment in a diversity case originally filed in Florida state court and then removed, by Admiral, to the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. § 1441 (2000). The jurisdiction of the Middle District of Florida was based upon 28 U.S.C. § 1332 (2000), thus both the Middle District of Florida and the Eleventh Circuit were applying Florida insurance law, *Erie Railroad*, *supra*, and were, as United States District and Circuit Courts sitting in diversity do, attempting to predict how the Florida Supreme Court would rule on the issues presented. *See The Lexington Ins. Co. v. Rugg & Knopp, Inc.*, 165 F.3d 1087, 1090 (7th Cir. 1999).

The opinions cited by Admiral were likewise diversity cases in which the Circuit and District Courts were applying state law. To the extent the cited opinions conflict with the Eleventh Circuit's opinion – which for reasons discussed below it is contended they do not – Admiral shows this Court nothing more than a divergence in the way various states have interpreted 'claims-made' insurance policies. Admiral presents no conflict amongst the Circuit Courts as to any act of Congress or any Federal Rule of Procedure or Federal Rule of Evidence. Rather, Admiral simply argues that this Court should grant its Petition because the First, Fifth, Sixth, and Seventh Circuits have interpreted insurance contracts under the laws of Massachusetts, Texas, Kentucky, and Illinois different than the Eleventh Circuit has interpreted an insurance policy under Florida law.[1]

As to the second major problem with the Petition, Admiral, in addition to not presenting this Court with a Circuit conflict as to a question of Federal law, has not demonstrated any conflict at all because it has not shown that the other Circuits were interpreting the same contract language that the Eleventh Circuit was presented with, nor, for that matter, were presented with similar factual scenarios. Because the opinion of the Eleventh Circuit concerned simple contract interpretation, and the opinions cited as being in conflict did not involve the same facts and the same contract

1. Specifically, in *Matador Petroleum Corp.*, 174 F.3d at 656 the Fifth Circuit was applying Texas law in interpreting the insurance policy. Likewise, in *Talcott*, 931 F.2d at 167, the First Circuit was applying Massachusetts law, in *Baker & McKenzie*, the Seventh Circuit was applying Illinois law, in *CheckRite, Ltd., Inc. v. Illinois National Ins. Co.*, 95 F. Supp. 2d 180, 188 (S.D.N.Y. 2000), the District Court was applying New York law, 95 F. Supp. 2d at 188, in *City of Harrisburg v. Int'l Surplus Lines Ins. Co.*, 96 F. Supp. 954 (M.D. Pa. 1984), *aff'd*, 770 F.2d 1067 (3d Cir. 1985), the court applied Pennsylvania law, and in *National Union Fire Ins. Co., supra*, Illinois law was applied.

language which the Eleventh Circuit was confronted with there is no conflict among the opinions.

In this regard, it should be noted that Admiral does not even claim a divergence between the cited cases and the decision below as to the manner in which the principles of contract interpretation were applied. In other words, in all of the cases cited by Admiral, the courts reviewed various policies for ambiguities and applied the facts of each case to the contract as interpreted. This is what the Eleventh Circuit did in this case, thus there is no conflict.

Here, the Eleventh Circuit specifically indicated that the facts before it presented a somewhat unique scenario. *Id.* at 1302 n.5 (stating that "[t]his particular scenario has only been addressed by a few other district courts," and noting that in those cases the policy language in the case *sub judice* was not being interpreted"). Likewise, the Eleventh Circuit specifically noted that it found only one case interpreting language similar to that in the policy Admiral issued to Cast Steel, and in that case the court had found the language ambiguous. *Id.* at 1302-03, *citing Helberg v. Nat'l Union Fire Ins. Co.*, 102 Ohio App.3d 679, 657 N.E.2d 832, 833-35 (1995). The Eleventh Circuit then indicated that it found persuasive the reasoning employed by that court in finding the language to be ambiguous, and then proceeded to interpret the Admiral policy by utilizing similar reasoning, *Id.* at 1303, and ultimately concluding the policy language in this case ambiguous. *Id.* In doing so, for the reasons set forth above, it created no Circuit conflict, nor did it commit any error.[2]

2. Admiral argues that the Eleventh Circuit should have utilized the reasoning employed by the Southern District of Florida, and ultimately affirmed by Eleventh Circuit in *Pantropic Powers*

(Cont'd)

II. This Case Concerns Interpretation Of An Insurance Policy Under Florida Law And Insurance Matters Are Normally Left To The States.

Admiral is essentially asking this Court to affirm what Admiral refers to as "the sanctity and enforceability of a claims-made (insurance) policy." *See Petition* at p. 7. What Admiral is in fact asking this Court to do is to grant its Petition for Writ of Certiorari apparently for purposes of creating a federal common law as to issues of interpretation of insurance policies. As both this Court and Congress have indicated, matters of insurance law should be left to the states.

(Cont'd)

Products, Inc. v. Fireman's Fund Ins. Co., 141 F. Supp. 2d 1366 (S.D. Fla. 2001), *aff'd*, 34 Fed. Appx. 968 (11th Cir. 2002), and not that employed by the Ohio state appellate court in *Helberg*, *supra*, implying that the Eleventh Circuit erred in doing so. The *Pantropic Powers Products*, court found *Helberg* distinguishable, 141 F. Supp. 2d at 1371 n.13 ("The Court expresses no opinion as to whether the Florida courts would adopt the holding of this Ohio appellate decision"), and the Eleventh Circuit found *Helberg* persuasive and *Pantropic Powers Products*, distinguishable, *Cast Steel*, 348 F.3d at 1303-04. There was no error in this. As to Federal Courts sitting in diversity, "[w]here the state supreme court has not ruled on an issue, decisions of the state appellate courts control, unless there are persuasive indications that the state supreme court would decide the issue differently." *The Lexington Ins. Co.*, 165 F.3d at 1090. In the absence of controlling state law on a particular issue, a Federal Court sitting in diversity "may consider decisions from other jurisdictions." *Id.* Thus, in looking to the opinion in *Helberg* the Eleventh Circuit did not err. To the extent which, as Admiral argues, it erred in not applying *Pantropic Powers*, – which Cast Steel contends it did not– then that would at most present an intra-circuit conflict, something which this Court has indicated is not cause for granting a petition for a writ of certiorari. *See generally Davis v. United States*, 417 U.S. 333, 340 (1974).

See Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 319 (1955); 15 U.S.C. § 1011 (2002). In *Wilburn Boat*, this Court held that state law concerning breaches of warranties would apply in maritime insurance policies despite such contracts being maritime contracts which traditionally have been governed by Federal Law, 348 U.S. at 316. In so holding this Court noted that:

> [t]he hearings on the McCarran Act reveal the complexities and difficulties of an attempt to unify insurance law on a nationwide basis, even by Congress. Courts would find such a task far more difficult. Congress in passing laws is not limited to the narrow factual situation of a particular controversy as courts are in deciding lawsuits.

Id. at 319. As this Court later expressed in that opinion:

> Under our present system of diverse state regulations, which is as old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceedingly cautious about disturbing this system, even as to marine insurance where congressional power is undoubted. We, like Congress, leave the regulation of marine insurance where it has been – with the States.

Id. at 320-21 (internal citations omitted).

If this Court were to grant Admiral's Petition it would effectively be reviewing whether there is a conflict between Florida insurance law, Massachusetts insurance law, Illinois insurance law, and Texas insurance law as to interpretation

of the language contained in insurance policies. This is something this Court long ago indicated it would not become involved in. *Id.* Again, however, there is no conflict amongst the opinions cited by Admiral as to how the Courts approach interpretation of insurance contracts. All of the cases cited by Admiral involved a review of an insurance policy for any ambiguities and, when an ambiguity existed, the application by the Court of the time-honored doctrine of *contra proferentem*. That is exactly what the Eleventh Circuit did in the decision below.

As well, Admiral's argument that a conflict exists ignores the fact that states often vary as to key issues of insurance law. *See generally Deni Associates of Florida v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1140 (Fla. 1997), (noting that Florida's non-recognition of the doctrine of reasonable expectations in interpreting insurance contracts differs from the laws of some of the other states which do recognize that doctrine); Compare *Lassiter Const. Co., Inc. v. American States Ins. Co.*, 649 So. 2d 768, 770 (Fla. 4th DCA 1997) (noting differing interpretations by various states of certain language in commercial general liability insurance policies) *Stratton & Co., Inc. v. Argonaut Ins. Co.*, 495 S.E. 2d 545, 547 (Ga. App. 1996) (same).

What the limited examples in the previous paragraph show is that the laws of the fifty states often differ in regards to issues of insurance law. This is nothing new and Admiral makes no argument as to why, as a matter of public policy, this long-standing tradition should be varied from. In summary, Admiral has not shown any 'compelling reason' why this Court should venture from the long-standing view held by both this Court and Congress that the business of insurance is to be left to the states.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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